In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2039

HERMAN LEE PETTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless search of his basement violated the Fourth Amendment, that the evidence was insufficient to support his conviction, and that the trial court's instruction on the lesser included offense was erroneous.

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted[1] on one count of an indictment charging him with possessing heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of five years' imprisonment, to be followed by a special term of three years' probation. The court of appeals affirmed (Pet. App. A).

[1]Petitioner's wife and co-defendant, Mary Petty, was also found guilty of the same offense. The trial court, however, set aside her conviction (Pet. App. A2).

The evidence showed that on June 6, 1972, an informant purchased heroin from one Maurice Wheeler at 3071 Cissna, Kansas City. On July 26, 1972, government agents went to that address with a warrant for Wheeler's arrest (H. 2-3).[2] Several agents approached the front door of the residence, while others went around to the rear of the house. Agent Robert Lawton knocked on the front door and identified himself. Mrs. Petty then exclaimed "federal agents" and, after a momentary delay, opened the front door (H2., p. 4).

Agent James W. Eapmon, who was at the rear of the residence, heard Agent Lawton knock and identify himself, and a voice inside the house shout "federal officers." The rear door then swung open and petitioner ran from the house carrying a small brown paper bag. The agent shouted "police officer," whereupon petitioner turned and ran into the basement of the residence (H. 4). The officer again called to him to halt and then, followed by Agent Benjamin E. Shull, went down the steps leading into the basement. Petitioner then surrendered and submitted to a frisk. The brown paper bag, however, was not found in his possession.

After leaving petitioner with other agents, the officers re-entered the basement (H. 7). Agent Shull saw a brown paper bag sticking out of a tire[3] (Tr. 121). He opened the bag and found several bottles of white powder and drug-related paraphernalia (measuring spoons, gelatin capsules,

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[2]"Tr." refers to the transcript of the trial, which took place April 17, 1973. "H." refers to the transcript of the testimony of James W. Eapmon at the suppression hearing held October 13, 1972. "H2" refers to the transcript of the testimony of Robert Thomas Lawton at the suppression hearing held October 13, 1972.

[3]Agent Eapmon testified at the suppression hearing that he had discovered the bag lying on top of a stack of tires (Tr. 14). At trial, however, he stated that he believed that it was actually Agent Shull who had "initially found" the bag (Tr. 56). Agent Shull then testified that indeed it was he who had discovered the bag (Tr. 121). The defense thereupon renewed its motion to suppress the evidence seized. After hearing argument, the court held that the search was constitutionally permissible (Tr. 138-146), and the court of appeals agreed (Pet. App. A3).

and a bottle cap with a wire handle) (H. 8, Tr. 122-123). The officers then observed a plastic bag lying on a cinder block nearby. Inside the bag, they discovered a tin-foil wrapped package containing brown powder. Field tests indicated that the white powder was cocaine and that the brown powder was heroin.[4] Petitioner and his wife were then placed under arrest (Tr. 60).

1. Petitioner contends that the warrantless search of his basement was not incident to an arrest, and that it therefore violated the Fourth Amendment. However, petitioner misconstrues the nature of the search. We submit that the search was incident to petitioner's arrest because the search occurred within an area which was in reach of petitioner when he was apprehended.[5] See *Chimel* v. *California*, 395 U.S. 752, 766. It is clear that the agents had probable cause to arrest petitioner even before narcotics paraphernalia were discovered. The agents knew that narcotics transactions had occurred on the premises. Upon their announcement that "federal officers" were present, petitioner immediately ran from the house carrying a small brown paper bag. When one agent shouted "police officer" to him, petitioner turned and ran into the basement. He did not stop when the agents shouted for him to halt.

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[4]Later tests revealed, however, that while the brown powder was heroin, the white was not cocaine but a quinine and lactose substance commonly used to cut heroin (Tr. 162). The brown powder was found to contain 4.78 grams of heroin, enough to make approximately 470 dosage units for street sale (Tr. 160).

[5]*Vale* v. *Louisiana*, 399 U.S. 30, relied upon by petitioner, is not controlling, since in *Vale* the defendant was apprehended on the front steps of his house and the subsequent search comprised the entire house. Here, in contrast, petitioner was apprehended in the basement of the house, and the subsequent search took place in the immediate area in which he was apprehended.

The agents who followed him into the basement discovered petitioner crouching under the porch, approximately ten feet from the basement door (Tr. 54). Had they wished, the agents could, under the rule enunciated in *Chimel, supra,* then make a warrantless search of the immediate area in which petitioner was found. The paper bag was discovered within some tires which were stacked approximately halfway between the basement door and the porch (Tr. 121)—clearly within petitioner's reach when he was apprehended and therefore within the proper scope of the search. The plastic bag likewise lay within petitioner's reach, on a cinder block under the porch where he was apprehended (Tr. 84). Since a search of the tires would therefore have been permissible at the time petitioner was arrested, the agents could lawfully first secure his person by removing him from the basement prior to making the search. *Chambers* v. *Maroney,* 399 U.S. 42.

Moreover, exigent circumstances required that the agents undertake the search immediately, rather than wait until they had obtained a search warrant. Because they knew that narcotics transactions had occurred on the premises, and they had seen petitioner run from the house with a paper bag when they announced their presence, the agents had reason to believe that the paper bag contained evidence of narcotics. They knew that at least one other person—Mrs. Petty—was in the house, and there was a real possibility that she or other individuals who might be hiding in the house would attempt to destroy the evidence. Had the agents staked out the house and detained its occupants until a warrant was obtained in order to assure that the evidence was not destroyed, the resulting intrusion upon Fourth Amendment rights would have been arguably greater than that resulting from the warrantless search. See *Chambers* v. *Maroney, supra,* 399 U.S. at 51-52; see also *Warden* v. *Hayden,* 387 U.S. 294, 298-299. Under these circumstances, the warrantless search was reasonable even if not viewed as incident to petitioner's arrest.

2. Petitioner contends that there was no evidence that he either possessed or intended to distribute narcotics. He therefore asserts that the trial court erroneously denied his motions for acquittal and a new trial.

There was sufficient evidence, however, from which the jury could reasonably infer that petitioner had possession of narcotics and intended to distribute them. Police found heroin in petitioner's basement after apprehending him there. They also discovered material and equipment commonly used to prepare heroin for use. Petitioner was apparently attempting to hide the drug-related paraphernalia when he was found by investigating officers. The heroin removed from the basement amounted to 4.78 grams, from which approximately 470 dosage units could be made for street sale (Tr. 160). See *United States* v. *Echols*, 477 F. 2d 37 (C.A. 8), certiorari denied, 414 U.S. 825; *United States* v. *Johnson*, 469 F. 2d 973 (C.A. 5); *United States* v. *Ortiz*, 445 F. 2d 1100 (C.A. 10), certiorari denied, 404 U.S. 993. Moreover, no evidence was adduced that petitioner or his wife was an addict. See *United States* v. *Echols*, *supra*.

3. Petitioner contends that the trial court erred in instructing the jury that if it should "unanimously" find him "not guilty" of the crime charged, only then should it proceed to determine his guilt or innocence as to the lesser included offense of possession (Tr. 214). Petitioner did not request that a lesser included offense instruction be given (Tr. 224). Although the court provided defense counsel with a copy of the proposed instruction prior to charging the jury, counsel at no time objected to the instruction.[6]

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[6]Defense counsel did object to the instruction as it applied to petitioner's wife, Mary Petty, but on grounds that there was no evidence that she even possessed the narcotics in question (Tr. 191, 224).

Petitioner's contention seems, therefore, to rest upon the proposition that, even without a request for a lesser included offense instruction, due process requires that a jury be permitted to consider a lesser included offense without first concluding that the defendant is innocent of the offense charged. Petitioner has failed, however, to cite any authority for this proposition and we know of none. Moreover, since there was no objection made to the instruction, it cannot constitute grounds for reversal unless there was "plain error". which, we submit, did not occur here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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